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Supreme Court, U.S.
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CASE NUMBER 93-1772

THE SUPREME COURT OF THE UNITED STATES
OCTOBER 1993 TERM

ETHEL L. PUSEY
Petitioner

v.

THE CITY OF YOUNGSTOWN, OHIO,
AND MAUREEN CRONIN
Respondents

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. DOES THE OPERATION OF OHIO REVISED CODE, SECTIONS 2937.081 AND 2943.041, PROVIDE VICTIMS OF CRIME OR THEIR NEXT-OF-KIN WITH A CONSTITUTIONALLY PROTECTED RIGHT?

II. DOES A LOCAL PROSECUTOR ENJOY IMMUNITY IN HER DECISIONS AS TO WHETHER TO PROSECUTE AND ON WHAT CHARGES?

III. WHERE A COMPLAINT ESTABLISHES NO COGNIZABLE CLAIM AGAINST A MUNICIPALITY, MAY THE MUNICIPALITY BE HELD ACCOUNTABLE FOR A SINGLE ALLEGED ACT OF AN EMPLOYEE?

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STATEMENT OF FACTS AND OF THE CASE

Derrell Pusey, son of Petitioner Ethel Pusey, died as a result of a gunshot wound inflicted by one Eric Bator while Pusey was apparently attempting a robbery. Bator was employed as a security guard.

Bator was charged with involuntary manslaughter, a violation of Ohio Revised Code Section 2903.04. A preliminary hearing was set in Youngstown Municipal Court on September 24, 1991, but was continued to October 1, 1991, by Judge Patrick Kerrigan on Respondent, Prosecutor Maureen Cronin's, motion.

Ohio has certain "victims of crime" statutes, among them, Ohio Revised Code Sections 2937.081 and 2943.041. The first, Section 2937.081, requires the prosecutor assigned to certain charged crimes, in-

cluding Ohio Revised Code Section 2903.04, to provide the victim of the crime (or the "next of kin of a deceased victim," Ohio Revised Code Section 2937.081(D)) with the date, time and place of the "trial pertaining to the particular offense or count" or, if resolved without trial, the time, date and place a plea will be made "pertaining to the offense or count" OR the date, time and place "final disposition of the offense or count otherwise will be made." It is important to note that notice may be mailed or communicated orally (Ohio Revised Code Section 2937.081(E)) and is only to be provided if, "prior to the time at which notice is required" the prosecutor, "is provided a written memorandum" with information enabling the prosecutor to call or write the victim or his next-of-kin or their agent.

Ohio Revised Code Section 2843.041 provides that, "the court shall determine" for the specified charged crimes, "whether the victim of the act ... or a representative member of the victim's family if the victim died as a result of the act, is present at the hearing or proceeding at which the charge is resolved." Among other things, "the court" then informs the family member if one is present that he or she may make a statement "relative to the victimization" personally, "subject to any reasonable terms and conditions it imposes" on the family member or statement itself. There are no civil or criminal penalties provided under either statute for failure to comply on the part of the judge or prosecutor. There is no provision that failure of notification affects the criminal case in any way.

On September 25, 1991, Petitioner went to the Prosecutor's office seeking information about the Bator matter. Ms. Cronin met with her for approximately 45-55 minutes, see Affidavit of Ms. Cronin attached to Defendant's Supplemental Memo in support of summary judgment filed September 15, 1992, Docket #20. This was Ms. Cronin's first contact with Petitioner. At this meeting, Ms. Cronin not only secured Petitioner's address, phone number and days and hours of availability as required by Ohio Revised Code Section but also orally advised Petitioner a hearing was to be held September 27, 1991, at which time the charges against Bator might be reduced, see Affidavit.

On September 26, 1991, counsel for Petitioner, Mr. Percy Squire, contacted Ms. Cronin. She related this same information

to counsel, including the fact that a hearing was to be held the next day, Affidavit attached to Supplemental Memo, Docket #20. Ms. Cronin's only statutory duty was to provide oral notice to the next-of-kin or her agent of the date, time and place of hearing. This duty was now fulfilled.

Petitioner's counsel faxed to Ms. Cronin and Judge Kerrigan a letter on the afternoon of September 26, 1991, asking that he be given the notice required pursuant to Ohio Revised Code Section 2937.081. In the second paragraph of this letter, counsel further states that Petitioner's family "vehemently opposes" action in the Bator case prior to October 2, 1991, acknowledging the fact that he knew of the hearing scheduled next day. The letter also stated that Petitioner's

family wanted the case removed from municipal court and wanted instead to force its presentation to the Mahoning County Grand Jury, attachment to Defendant's Motion for Summary Judgement, Docket #16.

The hearing set for September 27 proceeded as scheduled. Petitioner failed to attend. Bator pled no contest to a local ordinance defining negligent homicide, tantamount to a violation of Ohio Revised Code Section 2903.05, a reduced charge. Sentencing was postponed until after a pre-sentence investigation.

Petitioner filed a mandamus action in the Ohio Supreme Court on October 1, 1991, against Ms. Cronin, Judge Kerrigan and the Youngstown Police Department attempting to enjoin further action against Bator until the named defendants "perform[ed] the acts

required by Ohio Revised Code Sections 2937.081, 2943.041 and 2743.712 in advance of accepting a plea from Mr. Bator," and requested an order vacating Bator's plea until Petitioner could make a statement to the Municipal Court. Petitioner's injunction was denied October 10, 1991, and she dismissed the complaint altogether on December 21, 1991, which dismissal was granted by the court eight days later.

The pre-sentence investigation hearing for Bator was scheduled December 13, 1991, at 10:00 A. M.. Even though Petitioner had no statutory right to make a statement at this hearing, the judge allowed her to, even going so far as to continue the hearing until 3:00 P. M. to allow Petitioner to have her personal counsel present, see Transcript of Proceedings, page 3, lines 5 through 7, attached to

Docket #20, Defendant's Supplemental Memo. Petitioner, herself did make a statement at this hearing, Transcript pages 8 through 10, Docket #20, Defendant's Supplemental Memo. Counsel for Petitioner objected to Petitioner making this statement as that attorney insisted he be allowed to read a prepared statement to the court in her place. Judge Kerrigan refused to allow the attorney for the next-of-kin to speak.

On or about December 13, 1991, Petitioner filed a Complaint in Federal District Court against Ms. Cronin and Judge Kerrigan. In it, Petitioner asked the district court to restrain any further Bator action and asked the court to declare that these defendants violated Petitioner's First and Fourteenth Amendment rights of free expression and access to the courts. On May 19, 1992, Petitioner dismissed this

action after filing the present action instead against Ms. Cronin and the City of Youngstown on May 8, 1992.

The present action was filed by Petitioner in Federal District Court on May 8, 1992. It purports to be filed under the auspices of 42 U.S.C. Section 1983. The complaint itself specifically alleges certain things. First, although the case is filed against only the City of Youngstown and its Prosecutor, Maureen Cronin, in paragraph 6 of the Complaint it states that the Youngstown Municipal Court is a branch of Youngstown government and the court's judges are governmental officials of the City.

Next, at paragraph 6, the Complaint alleges that Respondent Cronin (hereinafter referred to as Ms. Cronin), sued only in her official capacity, failed in her stat-

utory duty to provide notice to Petitioner of the reduction hearing held in the matter, that the judge (not made a party herein) failed to inquire whether a family member was actually present as he is statutorily required to do and that somehow Ms. Cronin had a duty to tell the judge of his statutory duty and did not. Petitioner claims these amount to a violation of her "due process rights," these amount to a denial of "meaningful access to the courts" in violation of her Fourteenth Amendment rights and that these amount to a violation of her "right of expression" under the First Amendment.

The Complaint also alleges that Petitioner was denied effective assistance of counsel in that the non-party judge failed to allow Petitioner's counsel speak for her at the pre-sentencing hearing and

Ms. Cronin failed to "counsel" the judge that this amounted to a denial of effective assistance. Due to this "failure" on the part of the judge, Petitioner says she was unable to ask the court to vacate the plea bargain and send the case, instead, to the Mahoning County Grand jury. Petitioner alleges these acts also deprived her of her liberty interest in access to the courts.

Petitioner claimed that these alleged wrongdoings subjected her to psychological and emotional distress and asked the court for compensatory and punitive damages and attorney fees.

The case was originally assigned to Judge Dowd, however, on Petitioner's motion it was reassigned to Judge Manos.

Appellees, City of Youngstown and Ms. Cronin, filed for summary judgement, claiming absolute prosecutorial immunity

for Ms. Cronin and that the City could not be held in Section 1983 under the theory of respondeat superior, the only allegations against it which can be reasonably construed from the Complaint.

Petitioner filed a motion in opposition to Respondent's motion and filed a cross-motion for summary judgement, which for the first time alleged Ms. Cronin was being sued in her personal capacity and, also for the first time, raised issues of "failure to train" on the part of the City. Respondents filed a motion addressing these claims and Petitioner filed yet another reply.

On October 19, 1992, Judge Manos granted the summary judgment filed by the City and Ms. Cronin and denied Petitioner's motion. In his Memorandum of Opinion, Judge Manos notes that neither Ohio Revised

Code Section 2937.081 nor 2943.041 give Petitioner the right to interfere with a plea agreement, the acceptance of the plea by the judge or the right to determine whether or not a particular case should go to the grand jury. Further, Section 2943.041, putting a "mandate" on "the judge" to determine whether a next of kin was present allows the judge some discretion as to that person's statement and that the judge can consider or freely ignore altogether the statement in sentencing, Memorandum Opinion at 4-5.

In his lengthy opinion, the judge held that, "The only basis for liability on the City is respondeat superior," Memorandum Opinion at 6. As the City is not responsible for the action of the judge, court or its employees, the claims against the City were dismissed.

The judge next asserts that Ms. Cronin was sued in her personal, as well as official capacity, not apparent from the Complaint. However, the Court also states that as a state officer acting in her official capacity, Ms. Cronin was immune from a Section 1983 claim in both capacities.

Petitioner timely appealed to the United States Court of Appeals for the Sixth Circuit from this decision. The Court of Appeals affirmed the District Court decision in every way and refused reconsideration and rehearing en banc. Petitioner now attempts to bring the identical claims to this honorable Court on the identical arguments asserted below.

ARGUMENT

I. OHIO REVISED CODE, SECTIONS 2937.081 AND 2943.041, DO NOT OPERATE TO CONFER A CONSTITUTIONAL RIGHT OF ACCESS TO THE COURTS.

Throughout her argument, Petitioner has asked this honorable Court to make giant leaps of faith. First, by asking it and the two lower courts to glean from the allegations in the Complaint that she is attempting to hold the City liable for failing to train Ms. Cronin, even though these allegations are not pled. Next, she asks this Court to hold the prosecutor liable not only for the duty assigned her by statute, but seeks to hold the prosecutor responsible for the statutory duties assigned to the judge and for explaining to him the state of the law.

Petitioner asks the Court to believe that after a fifty-five-minute discussion with Ms. Cronin of her own and a telephone call the day prior to the hearing her counsel made to Ms. Cronin which he followed by an incriminating faxed message, Ms. Cronin did not tell Petitioner or her counsel of the scheduled reduction of sentence hearing for Bator. Finally, Petitioner asks this Court to find that the notification statutes provides her with constitutional rights of free speech, effective assistance of counsel, "liberty interests" in access to the courts and due process rights.

It is important to distinguish at this point the differences between Ohio Revised Code Sections 2937.081 and 2943.041. Only the first statute involves the local prosecutor, Ms. Cronin. Only the second involves the municipal trial court. Ohio

Revised Code Section 2937.081 is the only pertinent statute herein because, as later discussed, the judge is not a party and the City and its prosecutor cannot be held for any failure on the court's part, including those stemming from Ohio Revised Code Section 2943.041. Ohio Revised Code Section 2943.041 is plain on its face and clearly does not devolve a duty on the prosecutor in any fashion. Due to the attempts by Petitioner to confuse the issue and attach some duty to Ms. Cronin pursuant to this statute, it is important to reiterate that for purposes of this argument, Section 2943.041 is wholly inapplicable to either named party to this suit.

The issue before this honorable Court is whether Ohio Revised Code Section 2937.081 creates constitutionally protected

rights for Petitioner. This section provides that if a deceased victim's next of kin or her agent provides a name, address and telephone number in writing to the prosecutor prior to a trial, plea by a criminal in lieu of a trial or final disposition of certain criminal actions, the prosecutor "shall" notify the next of kin or her agent of the time, date and place one of these events will take place. The statute is written in the alternative: trial or plea or final disposition of the charge. The statute places a duty on the victim's next of kin to provide information in writing. The statute says the victim's kin must provide the information "prior to" one of the above three events, but not how much prior to the events. Finally, the statute allows the prosecutor to merely telephone and, if on the third try, she

fails to contact the victim's kin, she may abandon her efforts to contact. There is no penalty provision for failure to comply with this statute, either civil or criminal. Failure to comply with this statute does not affect the prosecution of the underlying criminal matter in any way.

Petitioner would like you to believe that because the statute purports to give the prosecutor a mandatory duty, that this automatically triggers a constitutionally protected right on the part of Petitioner. Petitioner relied below heavily on Kentucky Department of Corrections v. Thompson, 490 U. S. 454, 104 L. Ed. 2d 506, 109 S. Ct. 1904 (1989). Unfortunately, she did not go far enough of her analysis of the case and failed to recognize that under a Thompson analysis of the state statute, it is apparent that Petitioner has absolutely no protected rights created by statute.

As stated earlier, the statute appears to place a mandatory duty on a prosecutor. However, the duty is really a conditional one: only if she gets the proper information prior to one of three events is she to give notice, and then only for one of the three. Also, she can try telephoning and abandon her effort after three unsuccessful tries. There is no civil or criminal penalty for failure to notify and failure to notify triggers absolutely no further event (i. e., continuance of a criminal hearing, vacation of a plea, etc.)

Thompson does state that one matter to be considered is whether a "regulatory" statute contains "explicitly mandated language," 490 U. S. at 463. Thompson makes clear that this is only one part of the test. First, the statute must be

regulatory, contain specific mandates and have "substantive predicates;" "substantive limitations on official discretion," 490 U. S. at 462, citing to Olim v. Wakinekova, 461 U. S. 238, 249, 75 L. Ed. 2d 813, 103 S. Ct. 174 (1983), (where this honorable Court held that if the decisionmakers were not required to base decisions on some specific standards or guidelines, no constitutional right was involved) and Hewitt v. Helms, 459 U. S. 460, 472, 74 L. Ed. 2d 675, 103 S. Ct. 864 (1983). The statute, in order to be said to have created a constitutionally protected right, must somehow mandate the outcome the decisionmaker must follow, Thompson, 490 U. S. at 463. In other words, there must be some preordained outcome that will occur if the mandates are not followed. In Hewitt, it was that certain procedures must be fol-

lowed before prison officials could decide to administratively segregate certain prisoners. In Greenholtz v. Nebraska Penal Inmates, 442 U. S. 1, 11, 60 L. Ed. 2d 668, 99 S. Ct. 2100 (1979), it was that the board of corrections must order release of prisoners unless one of four specific conditions were found.

In the case at bar, there is no such mandatory outcome. Ohio Revised Code Section 2937.081 simply states that notice is to be given, but not unless Petitioner herself takes certain actions. Notice is to be given, but only in certain circumstances for certain charges. If notice is not given ... the statute is silent. Even if Petitioner could link the duties of the prosecutor under Section 2937.081 to the duties of the judge under Ohio Revised Code Section 2943.041, the

scenario does not change. Not only is the judge's duty to some extent conditional like the prosecutor's in the earlier statute, there is absolutely no preordained outcome. Whether or not Petitioner was/was not notified, whether or not she did/did not speak, the judge was free to entirely ignore her statements. Petitioner has no ability to change or influence the prosecutor or judge. There is no kind of penalty for failure to notify or allow a victim's kin to speak. The statutes do not allow a continuance of hearing or provide the criminal defendant with an automatic or mandatory course of action for failure to comply with the statutes. Despite what Petitioner would like this honorable Court to believe, the mere recitation of language which appears mandatory (but is really conditional) does not provide her with an

automatic constitutionally protected right. The statute in question provides no "substantive" limitation on Ms. Cronin's actions the course of the criminal prosecution or the judge's action and Petitioner's arguments in this respect must fail.

Based on the above, it can readily be seen that there is no conflict between the Sixth Circuit's reading of Thompson and the Fifth Circuit's holding in Chrissy F. by Medley v. Mississippi Department of Public Welfare, 925 F. 2d 844 (5th Cir. 1991). The Medley case is readily distinguishable from both Thompson and the decision below in this matter. Here, the state has seen fit to draft a statute placing conditional duties on a prosecutor, despite the use of seemingly mandatory language. In Medley, the duty devolves on the general public and

is absolutely mandatory: every single person who comes in contact with a child and suspects child abuse must report it to state officials. It is a mandatory child welfare statute. There are no conditional phrases and at no time is anyone excused from reporting suspected child abuse for any reason. Therefore in Medley, the mandatory language is truly mandatory. Suspected child abuse victims must receive some kind of process, unconditionally.

The Ohio statute here is unquestionably conditional. As stated in Olim v. Wakinekova, 461 U.S. 238, 75 L. Ed. 2d 813, 103 S. Ct. 174 (1983), "an expectation of receiving process is not, without more, a liberty interest protected by Due Process Clause," 461 U.S. 250, N. 12. For these reasons there is no conflict between the Fifth and Sixth Circuits and Petitioner's petition for writ should not be granted.

II. A PROSECUTOR IS PROTECTED BY ELEVENTH AMENDMENT IMMUNITY WHERE THE ENTIRE PURPOSE OF THE SUIT IS TO AFFECT AND INTERFERE WITH THE COURSE AND OUTCOME OF PROSECUTION.

It must be pointed out here that based on the earlier arguments that Petitioner has no constitutionally protected rights to notification, her reliance on Ex parte Young, 209 U.S. 123 (1908) is unfounded, Petitioner's second and third arguments are moot and this honorable Court should deny the petition for certiorari on this basis.

Notwithstanding this, it is settled law that a prosecutor is absolutely immune from suit for 42 U.S.C. Section 1983 claims when that prosecutor acts within the scope of his or her prosecutorial duties. In the case before us, the prosecutor was acting well within the scope of her duties and, regardless of whether or not she notified Petitioner of the reduction hearing, is absolutely immune from suit in this matter.

The seminal case in this matter, Imbler v. Pachtman, 424 U. S. 409, 47 L. Ed. 2d 128, 96 S. Ct. 984 (1976), reviewed the issue of prosecutorial immunity at common law. The Court found that this common law immunity from tort claims was equally applicable to Section 1983 suits. In holding that a prosecutor, "enjoys absolute immunity from Section 1983 suits for damages when he acts within the scope of his prosecutorial duties;" 424 U. S. at 420, "in the performance of the duties imposed on him by law," 424 U. S. at 422, quoting Yaselli v. Goff, 12 F. 2d 396, 406 (1926), the Court also stated:

> A prosecutor is duty bound to exercise his best judgment both in deciding which suits to bring and in conducting them in court. The public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own po-

> tential liability in a suit for damages.... Further, if the prosecutor could be made to answer in court each time such a person charged him with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law," 424 U. S. at 424-5.

While the Court's discussion was aimed specifically at the "intolerable burden" of defense of Section 1983 claims brought by an indicted or convicted criminal, it is self-evident that the burden of defending oneself from an entirely new, unexpected and tangential entity, the victim's family, could be even more intolerable in terms of sheer numbers and kinds of actions.

Imbler holds that in initiating and pursuing a criminal action, a prosecutor must have absolute immunity from suit. Petitioner claims that the asserted failure to notify her of the date, time and place

of the reduction hearing was an administrative act on the part of the prosecutor and which is subject to the immunity defense. Of course, it appears from the evidence that both Petitioner and her counsel were notified pursuant to statute. Even if this were untrue, however, it also appears from the evidence and argument of counsel that Petitioner's sole goal here and below was to affect prosecution of the Bator matter.

In his fax of September 26, 1991, Petitioner's counsel states at least two things: 1) that he was aware of the hearing scheduled September 27, 1991, (otherwise there was no need to fax the letter and no need to "vehemently oppose" any further action prior to October 2, 1991) and, 2) that the family intended to force the judge and prosecutor to send the matter to the Mahoning County Grand Jury on September 27,

1991, see attachment to Defendant's Motion for Summary Judgment, Docket #16. Also, in her Complaint at paragraph 7, Petitioner states she intended to object to the plea bargain arrangement, a reduction of charges Petitioner considered "inappropriate," Complaint paragraph 16. She expressed a desire to vacate this plea bargain and instead have the prosecutor and the judge bind Bator over to the Grand Jury, paragraphs 16 and 17. From this it can be seen that far from Petitioner objecting to a duty she believes merely administrative, her entire thrust, entire goal is to interfere with the ongoing criminal prosecution of Eric Bator.

The prosecutor is immune from suit where Petitioner attempts to interfere with a criminal prosecution. In Joseph v. Patterson, 795 F. 2d 549 (6th Cir. 1986),

cert. den. 481 U. S. 1023 (1987), the prosecutor was held immune in a case which stemmed from the prosecutor's decision whether or not to prosecute. In Taylor v. Kavanagh, 640 F. 2d 450 (2nd Cir. 1981) the prosecutor was absolutely immune from a Section 1983 action resulting from a plea bargain arrangement. In Burns v. Reed, 500 U. S. ___, 114 L. Ed. 547, 111 S. Ct. 1934, 1955-57 (1991), a search warrant matter, the Supreme Court reaffirmed previous cases which held that absolute immunity attaches to a prosecutor's actions where they are closely connected with the judicial phase of the process, pointing out that immunity traditionally extended to all hearings held before a judicial tribunal.

The Ohio statute itself supports the proposition that the notification provision is a prosecutorial duty. Despite Peti-

tioner's assertion that notification "implicates neither advocatory nor adjudicatory functions," Petitioner's petition page 16, the notification provision states that if the next of kin provides the mandatory written information, notification of the date, time and place of the trial, plea or hearing on final disposition should be given. At each of the above instances, the prosecutor is an active, participating character in the ongoing prosecution of the case. In fact, the prosecutor is involved far more intimately in a plea reduction hearing than a search warrant hearing, see Burns. It is only after all three of these enumerated occasions occur that the prosecutor's duties to pursue and process a criminal matter are virtually ended.

As Petitioner's admitted goal was to stop the prosecutor and judge from accepting a plea agreement and force these two state actors to relinquish prosecution to the county grand jury, the giving of statutory notice does indeed "involve decisions whether, how or whom to prosecute," Petitioner's petition, page 17. Nowhere is that more clear than in the fact pattern of the instant case.

III. A CITY MUST BE DISMISSED FROM A SUIT FILED UNDER 42 U.S.C. SECTION 1983 WHERE THE ONLY ALLEGATIONS AGAINST IT ARE THOSE BASED ON THE THEORY OF RESPONDENT SUPERIOR.

Contrary to Petitioner's arguments, she was barred from relief against the City of Youngstown because she failed to allege any wrongdoing on the part of the City, specifically. All of Petitioner's claims against the City are solely to be derived from its allegations against the local prosecutor. The lower courts, recognizing this, dismissed those claims against the municipality.

In her briefs before the lower courts, Petitioner for the first time raised "failure to train" allegations against the supervisor of the local prosecutor, the Youngstown City Law Director. The Law Director is not a party to suit. The Law

Director is never even given passing mention in the Complaint. Never, not once in her several page Complaint, does Petitioner raise any cognizable claim against the City except as may be gleaned from the allegations of wrongdoing on the part of the prosecutor and the municipal court judge, who is also not a party and who is clearly an employee of the State of Ohio. Petitioner, once a summary judgment motion was filed pointing out this failure, could have requested the District Court's permission to amend the Complaint so as to add its specific allegations of "failure to train." Petitioner did not. Petitioner's claim was not filed pro se and does not get the benefit of liberal construction. Even so, there is absolutely no indication in the Complaint that Petitioner was raising "failure to train" issues.

Petitioner did not specifically state that her claims against the City were based on respondeat superior, either. No claim against the City was specifically plead. This claim can be reasonably construed from the Complaint, however, as there is no other claim upon which Petitioner bases her case. The lower courts were entirely correct in granting the City summary judgement as to these allegations. Even if the City admits each and every allegation in the Complaint, under Monell v. Department of Social Services, 436 U. S. 658, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978), no claim may lie against the City.

Monell is dispositive of the issue that a municipality is not liable in respondeat superior for actions of its employees or officials; in order to state a valid claim against a city a plaintiff must

both plead and prove the existence of a custom or policy of violating an individual's rights, 436 U. S. 658 at 691-2. Petitioner failed to do either. It is for this reason that the City was properly dismissed in this matter.

CONCLUSION

Petitioner is improperly attempting to invoke jurisdiction of this honorable Court. This matter presents no "special and important reasons" pursuant to Rule 10 of the Rules of the Supreme Court why this matter should be reviewed. The Sixth Circuit decision here in no way conflicts with any other United States Court of Appeals and fully comports with the holdings of this honorable Court. Contrary to the statements made in Petitioner's petition here, this matter is entirely fact-based and the decisions below reflect both the unique factual considerations of this case and the procedural errors on the part of Petitioner. No constitutional rights are involved in this matter, no conflicts exist and Respondent respectfully

urges this honorable Court to overrule the Petition for Writ of Certiorari.

Respectfully submitted,

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